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IN THE

Supreme Court of the United States

October Term, 1959

No.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

vs.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ, NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Argument in Opposition to Reasons for Granting the Writ.

The petitioner in his Petition for a Writ of Certiorari sets forth his reasons why this Court should review the decision below. The Petition fails, however, to set forth valid reasons of consequence which are necessary to invoke the discretionary appellate power of this Court.

The first reason set forth by the petitioner is, in essence, that since the Court of Appeals decided an issue contrary to the contentions of both parties to a Treaty of Extradition, this Court must review such decision.

Such contention on the part of the petitioner completely ignores the position of the other parties in interest in the proceedings below. It is to say that the accused has no rights whatsoever. The petitioner himself recognizes such rights, however, in his own brief at page 22 of the Petition wherein he states that the extradition proceeding involves adverse litigants with real and substantial adverse interests. It is further to say that innocent third parties whose affairs are to be scrutinized and examined without limitation have no rights. This stated reason would, *a fortiori,* justify this Court in denying the Writ.

Next the Petition cites as a reason for granting the Writ the fact that the United States is a party to sixty-five bilateral Treaties of Extradition and a multilateral convention on extradition, and that if the decision below were allowed to stand the United States would become a haven for fugitive criminals from abroad and a notorious place for the concealment of their crimes. It is hardly necessary to point out that the United States has for a great many years been a party to international extradition treaties and that its performance under such treaties has hardly caused it to be considered a haven for foreign criminals or a notorious place of concealment of evidence of their crimes. It should be pointed out, however, that this cited reason completely ignores the fact that international extradition is concerned with the surrender of individuals for trial on charges of crimes committed elsewhere. The demanding country has full and ample opportunity to obtain the necessary evidence of guilt in its own jurisdiction and in accordance with its own procedures. To deny to such demanding nation the

right of court-empowered discovery in the nation of asylum hardly affects the treaty rights of such demanding nation. If a demanding nation cannot obtain such evidence of guilt in its own jurisdiction as may be necessary to justify the accused's detention (as distinguished from establishing his guilt), such nation should certainly not be entitled to extradition for the purpose of trial. See Article I of the Treaty with Venezuela, 43 Stat. 1698, Appendix 1, page 1, of Petition. This is particularly true in this case where the counsel for the petitioner in proceedings below has admitted that the petitioner's case in chief would rest on documents already a part of the record, and that the additional evidence sought by the attempted *subpoena duces tecum* would not be used for that purpose. See Appendix 2 to this brief. It would manifestly appear, therefore, that the petitioner seeks such additional evidence as an aid to the establishment of guilt in a Venezuelan trial and not as an aid in justifying detention and commitment for trial as is the function of the extradition hearing. There can be no doubt that the judicial processes of the asylum nation are not available for such purpose.

The petitioner next contends that this Court should settle the question of whether or not the so-called all-writs statute, 28 U. S. C. Section 1651, confers subpoena power upon the extradition "judge" in an extradition proceeding. No confusion exists here. There is no doubt but that *American Lithographic Company v. Werckmeister*, 221 U. S. 603, establishes that 28 U. S. C. Section 1651 includes the subpoena power. What the petitioner fails to recognize, however, is that this statute confers its power on the *courts* and not on the "commit-

ting magistrates" in a non-judicial proceeding. 18 U. S. C. Section 3184 provides *inter alia* that the accused is to be brought before "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." Hence, the "committing magistrate" as such acting official has come to be known (See, *e.g., Benson v. McMahon,* 127 U. S. 457, 463; *Charlton v. Kelly,* 229 U. S. 447, 460; *Collins v. Loisel,* 259 U. S. 309, 315-317.) does not necessarily have to be a United States justice or judge. He may be a judge of a State court of general jurisdiction. Could it be said in such latter case that such State court judge could invoke the power granted to the United States courts by 28 U. S. C. Section 1651? It is, therefore, apparent that the mere fact that the "committing magistrate" in this case happens to be a United States District Court judge does not confer on him the power of that court under such section. He must confine himself to such powers as are specifically granted to him as "committing magistrate."

In his reason numbered "Third" petitioner states that the decision below appears to conflict with accepted practice in extradition proceedings in that it might be bottomed on the argument of respondents below that evidence to be presented by the demanding nation in an extradition proceeding is limited to that upon which the accusation is based. This cannot possibly be the basis of the Court of Appeals decision for if it were the discovery proceedings for which the "committing magistrate" gave his permission by order dated March 9, 1960 would have been contrary to the mandate of the decision of the Court of Appeals, and the respondent's Petitions for

Writ of Prohibition or Mandamus with respect to such order would have been granted instead of denied. (See Appendix 2, p. 31, and Appendix 3, p. 15, of Petition.)

The Petition next contends that the decision below is inconsistent with a liberal construction of treaties of extradition. Respondent does not deny that *Factor v. Laubenheimer*, 290 U. S. 276, establishes such a rule of construction. Respondent does deny, however, that liberality of construction permits construction out of context. The petitioner contends that one sentence contained in Article XI of the Venezuelan Extradition Treaty empowers the "committing magistrate" to establish rules of procedure and substance in an extradition proceeding. That sentence is as follows: "The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested."[1] (43 Stat. 1698, 1704.) The paragraph from which this sentence has been lifted reads as follows:

> "It shall be competent for such diplomatic or superior consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested."

(See Appendix 1, p. 1, of Petition.) This entire paragraph is obviously referring to the procedures of the demanding nation in asking for and obtaining the

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[1]It is to be noted that the petitioner's method of quoting this sentence in its Petition at page 15 thereof indicates an omission therefrom when in fact none exists. See Appendix 1, p. 1, of Petition.

preliminary arrest of the person whose surrender is requested. The judicial functionaries referred to are those of the demanding nation, not those of the asylum nation. A proper reading of this paragraph requires such a construction. Even if it were otherwise the sentence makes reference to *complying* with "legal formalities," not *establishing* legal procedures as the petitioner would have this Court believe. It is also to be noted that when the Treaty in question refers to the judges of the country of asylum it uses the expression "a judge or magistrate" (Art XII) or "judges and magistrates" (Art. XIII). (See Appendix 1 hereto.) It does not refer to them as "judicial functionaries."

The petitioner's last citation of reason for granting the writ refers to the decision of the Court of Appeals with reference to the position of the depositors. The Petition erroneously concludes that the decision below, insofar as it relates to the appeal of the depositors, must be based on the depositor's property interest in the bank records of their accounts or on a privilege between bank and depositor. Indeed, the petitioner would have this Court believe that a depositor has no standing to object whatsoever. This is not true, however. In *Foster v. United States,* 265 F. 2d 183 (2d Cir., 1959), *Certiorari denied,* 360 U. S. 912, the concurring opinion of Judge Lumbard clearly illuminates the implied holding of the majority opinion to the effect that a bank depositor has a standing to object to a subpoena of the records of his deposit accounts with the bank, which standing is completely independent of the bank.

Further, the petitioner's contention here completely ignores the depositor's right to object to that which is completely void. The petitioner would have this Court be-

lieve that the bank depositors are complete strangers to the proceedings below, but to use the language of Judge Moore in an analogous situation, calling a depositor "a 'stranger' carries technical legalism beyond its outside limits." *United States v. Guterma*, 272 F. 2d 344, 345 (2d Cir., 1959). There can certainly be no doubt that this respondent is affected by the broad sweep of the *subpoenas duces tecum* which were issued by the District Judge and ordered quashed by the Court of Appeals below. These *subpoenas duces tecum* sought the production of all of the records of two banks having reference to the accounts of this respondent over an approximate ten-year period. The records sought are not just those which might relate to the accused in the extradition proceeding, but to all records relating to the respondent's accounts. Indeed, it was the broad scope of these *subpoenas duces tecum* which prompted this respondent to move to quash them. It is one thing to say that this respondent cannot be heard to object on the grounds of relevancy or privilege to that which is otherwise valid, but yet another thing to say that he cannot be heard to object to that which is completely void. Before the issuance of the *subpoenas duces tecum* in question, this respondent was a "stranger" to the extradition proceedings, but to say that he continues so after the issuance of these subpoenas for the purpose of denying him the right to object to their validity is to torture technical legalism beyond recognition.

The decision below is not, therefore, necessarily in conflict with other decisions of the Fifth Circuit or other courts of appeal. (See *Foster v. United States, supra.*)

Reasons for Denying Summary Reversal.

The respondent cannot believe that the petitioner seriously urges this Court to summarily reverse the Court of Appeals below. The Petition has gone to great length to point out that the decision below creates an unsettled state of the law with respect to a number of issues, and further that such issues are of great importance and that, therefore, this Court should review the decision below. It is obviously inconsistent with such contentions to then ask this Court to summarily reverse the decision below on the basis of the papers now before it.

This respondent does not question that this matter should be dealt with with "all deliberate speed," but at the same time does contend that matters of vital interest to him and to others are here at stake, and that such matters must not be sacrificed in the interest of speed.

The petitioner further asks this Court to summarily reverse the decision below for the purpose of improving international relations between this country and Latin American countries. It is undoubtedly unnecessary to point out here that international relationships fall within the scope of the duties of the executive branch of our government and not within those of the judicial branch. The improvement of international relations is, of course, to be desired, but such improvement should not be at the expense of a summary consideration of the rights of individuals.

Additionally, the decision below should not be summarily reversed for the simple reason that it is a correct decision. It is true that the Court of Appeals below did not cite its reasons in making its decision. The decision

below is, however, supportable on the simplest of reasons and it is not necessary for this Court to consider some of the more complex reasons which the petitioner seems to attribute to the Court below. The decision below is supportable on the simple ground that the District Judge, sitting as a commiting magistrate in an extradition proceeding, did not have the power to issue subpoenas outside the 100-mile limit established by Rule 45(e)(1) of the Federal Rules of Civil Procedure. As has been stated previously herein, the so-called all-writs statute, 28 U. S. C. Section 1651, does not confer subpoena power on a committing magistrate in an extradition proceeding, and it is specifically provided that the unlimited subpoena power in criminal proceedings does not apply to extradition proceedings. Fed. Rules Cr. Proc., Rule 54(b)(5), 18 U. S. C.

The respondent, therefore, respectfully urges this Court that the petitioner's prayer for summary reversal be denied.

Argument in Opposition to Summary Reversal.

The respondent has in the foregoing sections of this brief argued in opposition to the specific reasons propounded by the petitioner in seeking a Writ of Certiorari. Further, it is the understanding of this respondent that the respondents, The First National City Bank of New York, French American Banking Corporation, and The Royal Bank of Canada, will jointly file a brief in opposition in which the arguments set forth in the petition in support of the petitioner's prayer for summary reversal will be specifically met and opposed. This respondent will not burden this Court with a duplication of such arguments herein. Suffice it to state here that this respond-

ent contends (1) that the function of the committing magistrate in an extradition proceeding is not judicial in nature, (2) that the committing magistrate does not obtain subpoena power from 28 U. S. C. Section 1651, the so-called all-writs statute, (3) that the United States District Court does not have the power to issue a subpoena in aid of the jurisdiction of the committing magistrate, (4) that the extradition statute and treaty do not presuppose a subpoena power in an extradition case, and (5) that in the alternative if a subpoena power does exist, it is limited by the 100-mile limitation contained in Rule 45(e)(1) of the Federal Rules of Civil Procedure.

There follows, however, a brief statement of the grounds on which this respondent relies in opposition to the argument advanced by the petitioner in Section III of his Petition, at page 41 thereof, wherein he contends that the depositors can advance no ground to quash the subpoenas.

The issue at this particular point is not whether a depositor has a property interest in the records of his bank, or is a creditor of the bank; and it is not whether a privilege (to prevent compulsory disclosure) exists merely because of the depositor-bank relationship. The sole issue here is whether the depositors have standing to object on the grounds which they do in fact present.

Petitioner's implied premise—a depositor has no property interest in the records of his bank, *ipso facto* he has no standing in court to raise any ground whatsoever when the bank's records of his account are sought—is not supported by the cases he cites, and, indeed, is contrary to one of them. *Foster v. United States, supra*, held that a depositor does have standing in court under these facts to make objections on *some* grounds. The depositor in

that case apparently urged[2] that the subpoena constituted an unreasonable search as to the person served (the bank) and the Court answered that ". . . the appellants lack standing to raise *that* objection." (265 F. 2d at pp. 187-188) (Emphasis added). However, the depositor did have standing to raise other objections, as was noted in the concurring opinion.

Other cases cited by petitioner do not hold that a depositor has no standing to be heard. Rather, they hold only that, "[t]he Fourth Amendment does not guarantee to a person security against search, reasonable or unreasonable, in papers which are not that person's property and are not in his possession." (*In re Upham's Income Tax*, 18 Fed. Supp. 737, 738 (S. D. N. Y., 1937)); that, ". . . a third party is not entitled to invoke the protection of the Fourth Amendment. . . ." (*Zimmerman v. Wilson*, 105 F. 2d 583, 586 (3rd Cir., 1939)); and that a depositor has no property interest in the records of his bank.

McMann v. S. E. C., 87 F. 2d 377 (2d Cir., 1937), *cert. den.* 301 U. S. 684, likewise involved only the question of Fourth Amendment protection against unreasonable search and seizure, while in the case of *United States v. Peoples Deposit Bank & Trust Co.*, 112 Fed. Supp. 720 (E. D. Ky., 1953) *aff'd per cur.* 212 F. 2d 86 (6th Cir., 1954) the question of a depositor's standing to object was not an issue.

Petitioner has confused two separate and distinct problems in his citation of the cases on privilege (p. 43 of the

---

[2]The cases cited by the Court at page 187 involve unreasonable search and seizure as a ground of defense by the person served with the subpoena.

Petition). He has failed to distinguish the question of *grounds* of objection from the question of *who may raise those grounds, i.e.,* standing. These cases do not purport to say that a depositor has no standing to object, but hold only that the ground urged, *i.e.,* privilege by virtue of the relationship, is not a valid ground.

Petitioner would have us believe that he is entitled to engage in a fishing expedition without regard to the rights of others. He does not indicate the catch sought, but only the bait proffered—better relations between Venezuela and the United States. He seeks to pry into the financial affairs of these depositors albeit those affairs are totally and entirely unrelated to the extradition proceeding against Marcos Perez Jimenez. He urges justice on behalf of the people of Venezuela, but would deny these depositors their day in court.

It is one thing to grant a right of discovery of the private transactions of a third person when a need therefor is shown, but surely that does not establish the existence of such a right without regard to need. The orders of the District Court were of full scope and did not limit discovery to those financial transactions of the depositors that related to Mr. Jimenez.[3] Petitioner would support these orders by a citation from Wigmore to the effect that a witness may not question relevancy. Petitioner's argument applies a basically sound doctrine to an inappropriate factual situation, as the present problem is

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[3]Suppose the petitioner had obtained a *subpoena duces tecum* to procure discovery of the bank account of A.B. in the X Bank and the account had no bearing on this extradition proceeding. Certainly A.B. would have standing to object; yet, this same situation is present in the instant case to the extent of all transactions which do not involve or concern Mr. Jimenez, and petitioner would have this Court deny the depositors a chance to object.

deeper than the technical concept of relevancy. Indeed, Wigmore recognizes that a party desiring certain evidence is not the only one with rights at stake, and that rights of other parties require protection against infringement. Speaking of a satisfactory method of protecting a third party's rights, Wigmore says:

> "It is his duty to bring what the Court requires; and the *Court* can then to its own satisfaction *determine* by inspection whether the documents produced are irrelevant or privileged. This does not deprive the witness of any rights of privacy, since the Court's determination is made by its own inspection, without submitting the documents to the opponent's view. . . ." (VIII Wigmore, *Evidence*, §2200 (3d Ed. 1940).)

Who, then, is the proper party to assert these rights and to object to the infringement thereof? Certainly not the accused below, for he is not injured by compulsory disclosure of matters unrelated to him; nor are the banks injured thereby. It is *only* the respondent whose rights are being infringed upon and *only* the respondent who is the proper party to object thereto.

This argument applies with even greater force to the right of the respondent to object on the ground that the subpoenas are void by reason of a lack of power on the part of the official issuing them. A refusal of the courts to even hear such objection would create a grievous wrong.

Respectfully submitted,

WILSON B. COPES,

WELLMAN P. THAYER,

WILLIAM L. KUMLER,

Attorneys for Respondent Napoleon Dupouy.

APPENDIX 1.

The Extradition Treaty of Janary 19, 1922, between the United States and Venezuela, 43 Stat. 1698, contains in part the following provisions:

"Article XII

"If when a person accused shall have been arrested in virtue of the mandate or preliminary warrant of arrest, issued by the competent authority as provided in Article XI hereof, and been brought before a judge or a magistrate to the end that the evidence of his or her guilt may be heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent to hold the accused for a period not exceeding two months, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused, and if at the expiration of said period of two months such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released, provided that the examination of the charges preferred against such accused person shall not be actually going on."

"Article XIII

"In every case of a request made by either of the two Contracting Parties for the arrest, detention or extradition of fugitive criminals, the legal officers or fiscal ministry of the country where the proceedings of extradition are had, shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every legal means within their or its power; and no claim whatsoever for compensation for any of the services so rendered shall be made against the Government demanding the extradition, provided, however, that any officer or officers of the surrendering Government so giving assistance who shall, in the usual course of their duty, receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the Government demanding the extradition the customary fees for the acts or services performed by them, in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers."

APPENDIX 2.

Excerpts From a Hearing on a Motion Argued Before the Honorable William C. Mathes Held on March 7 and 8, 1960.

(a) Mr. Westwood, Counsel for the Consul General, pointed out that the documents sent from Venezuela were still in process of being translated from Spanish, and said [Tr. p. 377]:

> "There are some 2,000 pages of English translation which have been involved."

He stated that all the material would be ready about March 30, 1960. The following colloquy took place [Tr. p. 380]:

> "The Court: Would that mean that the plaintiff would rest upon the record?
>
> Mr. Westwood: That is right.
>
> The Court: Your case in chief?
>
> Mr. Westwood: That's right, your Honor."

(b) Later Mr. Westwood added [Tr. pp. 381-382]:

> "So that what we have in mind, then, is a submission by March 30th of our case in chief in the form that I have indicated."

(c) Thereafter the following colloquy ensued [Tr. pp. 392-393]:

> "The Court: I understand that the plaintiff expects to rest upon the record made upon these translations. Am I correct in that?
>
> Mr. Westwood: That is right, your Honor.
>
> The Court: And then you will put the defendant to any defense he wishes to make, and if any additional evidence by way of rebuttal is available, you will use it."